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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-354

[redacted]

JACK FOODEN, ON BEHALF OF THE MEMBERS OF COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, A VOLUNTARY ASSOCIATION, AND BENJAMIN SOLOMON, AND IDA LALOR,

Petitioners,

vs.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, A BODY CORPORATE AND POLITIC,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1901

JACK FOODEN, ON BEHALF OF THE MEMBERS OF COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, A VOLUNTARY ASSOCIATION, AND BENJAMIN SOLOMON, AND IDA LALOR,

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Respondent respectfully prays that the Petition For a Writ of Certiorari, filed in this cause, be denied.

OPINION BELOW

As indicated in the petition, the opinion of the Supreme Court of Illinois has not yet been officially reported, but appears in full in Appendices A and B of the petition. For the Court's assistance in considering the petition, Respon-

dent points out that the modification (A 11-12) to the original opinion (A 1-10), made by the Supreme Court of Illinois in considering and denying Petitioners' request for a rehearing, simply had the effect of striking the last paragraph beginning on A 9 and ending on A 10 from the opinion. Therefore, the text of the opinion which is the subject of the petition herein, ends on page A 9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

It is essential to supplement the provisions cited by Petitioners, by making reference to the Illinois statute on summary judgments and decrees.

Illinois Revised Statutes 1969, Ch. 110, Sec. 57, provides:

> (1) For plaintiff. Any time after the opposite party has appeared or after the time within which he is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment or decree in his favor for all or any part of the relief sought.
>
> (2) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment or decree in his favor as to all or any part of the relief sought against him.
>
> (3) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. A summary judg-

ment or decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(4) Form of affidavits. The form and contents of and procedure relating to affidavits under this section shall be as provided by rule.

(5) Affidavits made in bad faith. If it appears to the satisfaction of the court at any time that any affidavit presented pursuant to this section is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing it to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

QUESTIONS PRESENTED

The questions presented by Petitioners to this court (Pet. 2-3) do not accurately reflect the issue which they presented to the Illinois Supreme Court. Their exact statement of that issue was as follows:

> "The only issue in this appeal is whether the trial court was warranted in entering summary judgments in favor of the Defendant or whether there are significant and material unresolved or undisputed issues of fact remaining."

The resultant question to the Supreme Court of the United States is whether this case was resolved upon independent and adequate state procedural grounds.

STATEMENT OF CASE

In many respects, Petitioners' statement of the case might be considered acceptable. Its vice, however, is that it states the case they wish they had presented rather than the case actually tried in the Circuit Court and then appealed to the Supreme Court of Illinois. For this reason Respondent feels it essential to restate the case as accurately and briefly as possible.

Respondent Board is a body corporate and politic, which governs certain Illinois institutions of higher education, including Chicago State College. With respect to the College, the Board is authorized by statute to make rules, regulations and by-laws for its good government and management; and to employ, and for good cause, to remove all necessary academic and non-academic employees, contracting with them upon matters relating to tenure, salaries and retirement benefits. Pursuant to statute the Board adopted certain "*By-Laws, Governing Policies and Practices*" with respect to tenure, the appointment of teachers for probationary or tenured terms, and their reappointment. Those policies may be summarized as follows: Teachers are appointed for probationary periods which, in sum, should not exceed seven years and they acquire tenure only by Board action upon recommendation of the president of the college. After acquiring tenure, a teacher's services are terminated only for adequate cause, except in the case of retirement for age or under extraordinary circumstances because of financial exigencies, and he is otherwise entitled to reemployment at the expiration of a term appointment. A probationary teacher, however, has no right to reemployment at the expiration of a term appointment, provided that notice is given by March 1, in the first

probationary year, and by December 1, of any subsequent probationary year, if he is not to be continued in service after the expiration of the year. (A4-5) In May, 1968, the Board appointed Petitioners Solomon and Lalor as Associate Professors of Education at the College on a ten-month basis for the 1968-1969 academic year. Both accepted the appointments and signed agreements stating them to be for "Probationary-2nd Year" status and "subject to the *By-Laws, Governing Policies, and Practices*" of the Board. In November, 1968, Solomon and Lalor were notified by letters from the Dean of the Faculty at the College that their services would not be needed after the 1968-1969 academic year. (A3)

On April 7, 1969, Petitioners filed unverified complaints setting forth, among other things, the foregoing facts and further alleging that the Respondent Board had unlawfully failed and refused to offer Solomon and Lalor continued employment for the 1969-70 academic year and to establish compelling reasons why Solomon and Lalor should not be retained on the College faculty for the 1969-70 academic year. In their unverified complaint the Petitioners alleged "on information and belief" that Respondent's agents, the College President and Dean of the Faculty, had "removed" Solomon and Lalor from the faculty because of (a) their active membership and open support of the Union, and (b) open and determined leadership in initiating and convening campus-wide discussion over the problems of racism as a pervasive force in public education and the special responsibilities concerning such problems to be met by the College. The complaint prayed that the Court declare the rights of the parties and order the Board to offer Solomon and Lalor employment as Assistant Professors at the College for the 1969-70 academic year. (A3-4)

On April 18, 1969, at Petitioners' request, the Board considered the procedures followed with reference to the possible reemployment of Solomon and Lalor, and adopted a motion stating that it had reviewed the procedures, that the procedures were in compliance with Board policies, and that it supported the College President and his staff in their decision concerning the non-reappointment of Solomon and Lalor. On the same date, Petitioners filed their motion for emergency relief seeking an order requiring the Board to offer Solomon and Lalor employment for the 1969-1970 academic year. It was neither verified nor supported by affidavit, but a copy of the complaint was attached and incorporated by reference. (A4)

On April 29, 1969, the Board filed its motion for summary judgment, supported by the affidavit of the Executive Officer and Secretary of the Board. Petitioners filed no responsive pleading and no counteraffidavits. On May 6, 1969, the Court heard arguments of counsel on the Board's motion for summary judgment and allowed the motion, continuing the cause for written order which was entered on May 12, 1969. The Supreme Court of Illinois affirmed that judgment, finding that the matters before the trial court presented no real issue as to any material fact. (A5)

Petitioners now seek relief from the Supreme Court of the United States, arguing constitutional grounds which were not factually before either the trial court or the Illinois Supreme Court.

ARGUMENT

(REASONS FOR DENYING THE WRIT)

Petitioners' prayer for issuance of a Writ of Certiorari should be denied. The opinion of the Supreme Court of Illinois clearly establishes that the issue presented was resolved on independent and adequate state procedural grounds.

In *Henry v. State of Mississippi*, 379 U.S. 443, 446 (1965), Mr. Justice Brennan wrote:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. ed. 429, but also in cases involving state procedural grounds."

The reason for the United States Supreme Court's refusal to review petitions where adequate state grounds exist was stated by Mr. Justice Jackson in *Herb v. Pitcairn*, 324 U.S. 118, 125-126 (1945):

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction.... We are not permitted to render an advisory opinion and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

The test to be applied where a litigant's procedural default might prevent vindication of his alleged federal right is

whether "the state's insistence on compliance with its procedural rule serves a legitimate state interest". *Henry v. State of Mississippi*, 379 U.S. 443, 447 (1965).

The Illinois statute on summary judgments and the procedural rules providing for its implementation, as applied in this case, serve legitimate and important state interests. Mr. Justice Kluczynski of the Illinois Supreme Court delineated those interests within this case (A7) when he said:

> "We have previously held that summary judgment procedure is an important tool in the admission of justice, that its use in a proper case is to be encouraged and that its benefits inure not only to the litigants, in the saving of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials. *Allen v. Meyer*, 14 Ill. 2d 284."

The Illinois statute on summary judgments (Ill. Rev. Stat. 1969, Ch. 110, Sec. 57), heretofore set forth verbatim, is substantially the same as Federal Rule of Civil Procedure 56 (Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.). It provides that upon motion for summary judgment the judgment shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Crucial, therefore, to an understanding of the Illinois Supreme Court's decision is an understanding of the matters that were before the Court upon its consideration of the Respondent Board's Motion For Summary Judgment. Those matters included, for the Petitioners, a complaint which included certain allegations concerning their information and belief as to why they were not to be employed for a further term. The

complaint was not verified. For the Respondent there was a Motion For Summary Judgment supported by a detailed, duly executed affidavit. Petitioners filed no responsive pleading to Respondent's Motion For Summary Judgment, and no counteraffidavit to Respondent's affidavit in support of its motion. Faced with these matters the trial court awarded judgment for the Respondent and the Illinois Supreme Court said (A8):

> "Also, as against positive, detailed averments of fact in an affidavit, allegations made on information and belief by an adverse party are insufficient, for they are not equivalent to averments of relevant facts but rather put in issue only the pleader's information and belief and not the truth or falsity of the 'facts' referred to. *Whitley v. Frazier*, 21 Ill. 2d 292; *Smith v. Township High School Dist. 158*, 335 Ill. 346."

This position is entirely consistent with earlier cases, the Illinois Supreme Court having held in 1893 that allegations on information and belief are not equivalent to allegations of fact. *Lundahl v. Hansen*, 147 Ill. 504, 511 (1893).

Under Federal Rules of Civil Procedure, just as under the Illinois Civil Practice Act, it is clear that, faced with these circumstances and matters, a Federal Court would have granted the Respondent's Motion For Summary Judgment. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968) the court noted that it "is required . . . that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Petitioners in this case failed to present evidence in any form whatsoever. The United States Court of Appeals for the Fifth Circuit spoke directly to the Petitioners' position in *Piper v. United States*, 392 F. 2d 462, 464 (1969) where it held:

> "An unverified pleading denying the factual statements contained in an affidavit filed in support of summary judgment is not sufficient to controvert the affidavit. *The response is certainly not sufficient to show the existence of a triable issue of fact. Beaufort Concrete Co. v. Atlantic States Constr. Co.*, 352 F. 2d 460 (5 Cir. 1965); *Gauck v. Meleski*, 346 F. 2d 433, 436 (5 Cir. 1965); *Wilkinson v. Powell*, 149 F. 2d 335 (5 Cir. 1945)." (Italics added by Respondent, for emphasis.)

Petitioners rely heavily on this Court's recent action in granting certiorari in the case of *Sinderman v. Perry*, 430 F. 2d 939 (5th Circuit, 1970), Cert. granted, . . . U.S. . . ., 39 LW 3545 (Case No. 952, 1971). The petitioner in *Sinderman* followed proper procedure by filing three affidavits in suport of his pleadings and in addition made a clear offer of facts that would constitute a constitutional claim. An overwhelming distinction exists between *Sinderman* and the Petitioners' position, for unlike *Sinderman* the pleading here was only on information and belief. The Complaint was not verified. No affidavits were filed in support of the Complaint. No interrogatories or depositions were sought or propounded by the Petitioners and no offers of proof were made.

A short review of Illinois Civil Practice and Procedure makes it clear that a summary judgment under these circumstances was not only proper but necessary. As the Illinois Supreme Court indicates (A8-9) the Petitioners had procedural avenues available to them which they failed to utilize. Factual information to support their allegations on information and belief might have been obtained in several ways. "To contend that such factual information was not available to them is irrelevant for Supreme Court Rule 191(b), (Ill. Rev. Stat. 1969, Ch. 110A, Sec. 191), specifically provides for such exigency through

the use of interrogatories and depositions." (See also Fed. Rules Civil Proc. rule 56(f); 6 J. Moore, *Federal Practice,* Para. 56.24, at 2872 (2d Ed. 1953).

CONCLUSION

The Illinois Supreme Court has decided this case in accordance with well established procedural law, patterned substantially after Federal Rules of Civil Procedure. Illinois law has been applied consistently in the manner that it was applied in this case. *Whitley v. Frazier,* 21 Ill. 2d 292 (1961); *Smith v. Township High School Dist. 158,* 335 Ill. 346 (1929); *Lundahl v. Hansen,* 147 Ill. 504 (1893). It is clear that adequate, independent, state grounds exist for the decision in this case and that these grounds are supported by a legitimate state interest. *Allen v. Meyer,* 14 Ill. 2d 284 (1958). For these reasons, the Petition for a Writ Of Certiorari should be denied.

Respectfully submitted,

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